SUPERIOR COURT OF WASHINGTON

FOR JEFFERSON COUNTY

DONALD R. EARL, Plaintiff, v. MENU FOODS INCOME FUND and THE KROGER CO., Defendants.	The Honorable Craddock Verser No. 07-2-00250-1 CLERK'S ACTION REQUIRED: PLACE ON MOTION DOCKET **DEFENDANT MENU FOODS INCOME FUND'S MOTION TO LIMIT THE RETENTION OF ORGANIZED RECALLED PRODUCT, RAW WHEAT GLUTEN AND UNORGANIZED INVENTORY** Hearing Date: Friday, February 1, 2008 Hearing Time: 1:00 p.m.

I. INTRODUCTION AND RELIEF REQUESTED

Pursuant to Civil Rules 26(b)(1) and (c), and for good cause shown, Defendant Menu Foods Income Fund ("Menu Foods") moves the Court for an order limiting the amount of product that Menu Foods must continue to preserve for evidentiary purposes in this action.[1]

[1] Menu Foods Income Fund is the only named Menu Foods entity in this action; however, Menu Foods Income Fund does not itself possess any of the product at issue in this motion. Rather, other Menu Foods entities that are affiliated with Menu Foods Income Fund — but which are not named defendants in this action — currently possess the product at issue in this motion.

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Menu Foods currently is storing (a) over 2.7 million cases of product and (b) approximately 98,000 pounds of raw wheat gluten at a cost of $1.032 million per year, imposing an undue burden and expense on Menu Foods. Moreover, storage of this product poses serious health risks, as identified by the U.S. Food and Drug Administration. Menu Foods sought Plaintiff's consent to entry of the order requested by this motion, but Plaintiff refused to agree to such an order. Menu Foods, therefore, has no choice but to file this motion and seek relief from the Court.

The Court should grant Menu Foods' motion for four reasons. First, the product at issue on this motion is irrelevant to this action. The product Menu Foods currently is storing is product manufactured and ingredients used during the time period covered by a voluntary recall initiated by Menu Foods — *i.e.*, pet food manufactured between November 2006 and March 2007. Plaintiff, however, has admitted in his own Amended Complaint that the pet food that is the subject of this action was not subject to the recall; that pet food was produced in April 2006 and September 2006, a full seven months and two months, respectively, before the recall period. *See* Amended Complaint ¶ 21. Furthermore, Plaintiff alleges that the pet food he purchased was contaminated by acetaminophen and cyanuric acid, which are unrelated to the reasons for the recall.

Second, even if the product at issue were relevant to this action, which it is not, the order Menu Foods seeks by this motion is identical to an Order (attached to this Motion at Tab 2) entered on December 18, 2007, by the presiding judge in the Multidistrict Litigation styled *In Re Pet Food Products Liability Litigation*, Case No. 08-2867 (NLH), MDL Docket No. 1850 (All Cases) (the "MDL Order"), which is pending in the United States District Court for the District of New Jersey and into which over 100 cases filed in federal court were consolidated. The MDL Order was entered pursuant to Federal Rule of Civil Procedure 26 in response to an unopposed motion filed by certain defendants in the MDL proceeding (the "MDL Motion").

The MDL Motion, accompanying Memorandum in Support, and all supporting papers and exhibits are collectively attached to this Motion at Tab 3.

The allegations in the MDL arise from the voluntary recall of pet food by Menu Foods and other companies in March, April and May 2007 due to allegedly contaminated wheat gluten contained in the recalled pet food. The MDL Order limits the quantity of organized product related to the recall (the product that is the subject of this motion) currently stored by the MDL Defendants that the MDL Defendants must continue to retain for evidentiary purposes in the MDL — *i.e.*, a quantity sufficient for a statistically representative sample of product to exist to satisfy the research and testing needs of the MDL Plaintiffs and other interested parties, including a determination of the presence and range of toxin, if any, contained in the product. Such quantity was identified by an expert retained by the MDL Defendants (Dr. George P. McCabe), reviewed and not objected to by an expert retained by the MDL Plaintiffs, agreed to by the MDL Plaintiffs and approved by the MDL Court. By contrast, Plaintiff Earl — who will not agree to entry of an order identical to the MDL Order — has not retained any experts to consider or assess the statistical sampling plan. As with the MDL Plaintiffs, if the recalled product were relevant to Plaintiff Earl's case, the requested order would protect Plaintiff Earl's evidentiary needs while relieving Menu Foods of the significant burdens resulting from the storage of the food.

Third, the unorganized product in Menu Foods' possession is wholly unnecessary for adjudication of Plaintiff's lawsuit. Plaintiff has affirmatively represented to Menu Foods that he has retained numerous, unopened cans of the pet food that is the subject of his lawsuit. Specifically, Plaintiff has represented that he retained cans of unopened pet food bearing the same expiration date (and bought at the same time) as the pet food Plaintiff alleges was the cause of his pet's death. Those retained cans are plainly the evidence that is pertinent to Plaintiff's claims against Menu Foods. In short, discovery in this case need go no further than those cans of pet food retained by Plaintiff. In addition, the sampling and general retention

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plan authorized by the MDL Court will have no effect on any inventoried samples of the pet food relevant to Plaintiff's claims that Menu Foods may possess (for the MDL Order pertains to product subject to the recall, and Plaintiff's lawsuit involves only product from months prior to the recall period). Menu Foods has confirmed that it, like Plaintiff, possesses cans of the products that are the subject of Plaintiff's lawsuit from the same production days as the product that Plaintiff claims to have purchased and fed to his cat. Menu Foods is obviously retaining those cans, both because they are pertinent to this lawsuit and because they simply are not related to the MDL Order. Accordingly, this Court's approval of the MDL Order will not affect any of the parties' discovery needs in this case. Moreover, the enormous burden and expense associated with even inventorying and continuing to store the unorganized product currently held by Menu Foods substantially outweighs any remote chance that any additional pet food relevant to Plaintiff's claims might exist among the unorganized product.

Fourth, principles of comity strongly support this Court's entry of an order identical to the MDL Order. State courts frequently rely upon the principle of comity to defer to decisions made by federal courts. Thus, this Court should give comity to the federal MDL Court's order and enter an order identical to the MDL Order. Not only is entry of the requested order appropriate because the product currently being stored is irrelevant to this action, entry of the requested order is warranted even if the preserved product subject to this motion were relevant to this action. Notwithstanding that the recalled pet food is irrelevant to this case, Menu Foods has taken the conservative approach of seeking an order similar to the MDL Order because Plaintiff erroneously contends that the recalled pet food is relevant to his case. Plaintiff's purported discovery requests refer to the recalled pet food even though Plaintiff admits that the pet food at issue in this action was not part of the recall. *See* Amended Complaint ¶ 21; Letter from Donald R. Earl to Stellman Keehnel and Charles A. Willmes, dated December 24, 2007 (the "December 24 Letter") (attached to this Motion at Tab 4). Out of an abundance of caution, therefore, Menu Foods has not yet disposed of any product in accordance with the MDL Order because no similar order has been entered in this action.

In light of the significant expenses and public health concerns involved with the continued product storage, and Plaintiff's unreasonable refusal to agree to entry of the requested order, Menu Foods has no choice but to file this motion and respectfully requests that this Court enter an order identical to the MDL Order. Menu Foods further requests that the Court award it attorneys' fees and expenses associated with bringing this motion because Plaintiff's opposition is not "substantially justified."

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed this action in July 2007, alleging that his cat died as a result of eating allegedly contaminated pet food manufactured by Menu Foods and marketed and sold under Kroger's private label, but which was not part of the pet food recall. *See* Amended Complaint ¶¶ 1, 21. On October 1, 2007, Menu Foods moved to dismiss Plaintiff's original Complaint because (1) nearly all of Plaintiff's claims were preempted by Washington's product liability statute; and (2) Plaintiff did not (and could not) plead his fraud claims with the requisite particularity to satisfy Civil Rule 9(b). The Court granted Menu Foods' motion on October 12, 2007 and granted Plaintiff leave to file an amended complaint asserting statutory product liability claims. Plaintiff unsuccessfully sought partial reconsideration of that order.

Plaintiff filed his Amended Complaint on October 16, 2007. On November 15, 2007, Menu Foods filed its Motion (1) For A More Definite Statement And (2) To Dismiss In Part Plaintiff's Amended Complaint. In its motion, Menu Foods explained that (1) Plaintiff's Amended Complaint improperly attempted to reassert common law claims that the Court had already dismissed with prejudice; (2) the Amended Complaint did not state claims against Menu Foods for breach of express or implied warranty under Washington's product liability statute as a matter of law; and (3) Plaintiff's Amended Complaint was so vague and ambiguous that Menu Foods could not reasonably frame a responsive pleading. The Court granted Menu

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Foods' motion on December 21, 2007 and gave Plaintiff 20 days to file another amended pleading that clearly identifies Plaintiff's statutory claims and omits any previously dismissed claims.

Plaintiff has filed a Notice Of Appeal of the Court's December 21, 2007 Order, as well as a number of other orders in this case. Plaintiff decided not to file another amended complaint as required by the Court's December 21, 2007 Order.

On December 24, 2007, Plaintiff sent to Menu Foods' counsel a letter requesting production of documents. *See* December 24 Letter. Although Plaintiff's claims relate only to pet food that was manufactured months before the recall period, Plaintiff has nevertheless requested discovery from Menu Foods relating to, among other things, pet food testing and analysis and customer complaints through the recall period. *See id.* ¶¶ 4-6.

III. COURTS LIMIT DISCOVERY WHERE THE BURDEN OR EXPENSE OUTWEIGHS THE BENEFIT

This Court has broad authority to limit discovery when good cause is shown. CR 26(b)(1), 26(c)(2), 26(c)(4); *see also Gillett v. Conner*, 132 Wn. App. 818, 823, 133 P.2d 960 (2006) (stating that, for good cause, court "may make any order justice requires in order to protect a party or person from . . . oppression, or undue burden or expense," and noting that "[w]hen the language of a Washington rule and its federal counterpart are the same, courts look to decisions interpreting the federal rule for guidance") (internal quotation marks omitted); *United States v. Princeton Gamma-Tech*, 817 F. Supp. 488, 493 (D.N.J. 1993) (granting motion to limit discovery). This Court may limit discovery when "the burden or expense of the proposed discovery outweighs its likely benefit" to the party seeking discovery. *Gillett*, 132 Wn. App. at 824; *Maertin v. Armstrong World Indus., Inc.*, No. 01-5321, 2007 U.S. Dist. LEXIS 20561, at *4, 6 (D.N.J. Mar. 8, 2007) (rejecting request for insurer's claims files, which were located in 27 offices, because of the "burden and expense to obtain the requested discovery") (internal quotation marks omitted); *Reichhold, Inc. v. U.S. Metals Ref. Co.*, No. 03-

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453, 2007 U.S. Dist. LEXIS 34284, at *5, 27-30 (D.N.J. May 8, 2007) (affirming decision of magistrate judge; finding that "the burden of pursuing additional discovery concerning [defendants'] lead plant outweighs any potential benefits").[2]

Indeed, courts have limited discovery to statistical samples where, like here, the burden of full production outweighed its potential benefits. *E.g.*, *Benson v. St. Joseph Reg'l Health Ctr.*, No. H-04-04323, 2006 U.S. Dist. LEXIS 34815, at *4-7 (S.D. Tex. May 17, 2006) (permitting defendant health center to produce only 350 of 1,336 requested patient charts — a "representative sample" — because "imposing the full expense of producing all 1,336 charts upon Defendants would be undue and unfair"); *Long v. Trans World Airlines, Inc.*, 761 F. Supp. 1320, 1328-30 (N.D. Ill. 1991) (granting plaintiffs' motion for a protective order limiting discovery regarding class-wide damages to that "extrapolat[ed] from a representative sample" of roughly 3,000 class members; holding that benefits of full discovery of individual damages — even given court's concern for protecting individual class plaintiffs — was outweighed by substantial burden that could be "reduced considerably by limiting discovery to a representative sample").

As discussed herein, Plaintiff's allegations do not relate to any pet food that was subject to the recall, and there is therefore no reason, for purposes of this case, for Menu Foods to retain any of the MDL Order-related product it is currently storing. However, even if the product that Menu Foods is storing could be seen as relevant to this action, the need for the production of only a statistically significant sample is more compelling here than in *Benson* and *Long*. In those cases, the parties sought the full production of only 1,336 charts (*Benson*) and of discovery relating to damages for 3,000 class members (*Long*). Here, Menu Foods continues to store and maintain over 2.7 million cases of recalled pet food and other returned product and

[2] *Accord Quadrant EPP USA, Inc. v. Menasha Corp.*, No. 06-356, 2007 U.S. Dist. LEXIS 6539, at *5-6 (E.D. Pa. Jan. 29, 2007) (denying defendant's motion to compel discovery, which, if granted, would have required plaintiffs to review 50,000 pages of hard copy documents, because "the burden borne by the plaintiffs in producing" requested discovery "clearly outweighs any benefit the defendant might receive").

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over 98,000 pounds of raw wheat gluten. *See* Tab 3, Menu Foods Decl. ¶ 4. Accordingly, entry of an order limiting the amount of MDL Order-related product Menu Foods must continue to maintain for purposes of this action is proper.

IV. THIS COURT SHOULD ENTER AN ORDER LIMITING THE AMOUNT OF ORGANIZED PRODUCT, RAW WHEAT GLUTEN AND UNORGANIZED INVENTORY MENU FOODS MUST CONTINUE TO MAINTAIN BECAUSE THOSE PRODUCTS ARE IRRELEVANT AND UNNECESSARY TO THIS ACTION

Menu Foods' requested order relating to the retention of recalled pet food has no bearing on Plaintiff's claims in this case. It appears that Plaintiff is under the mistaken belief that the recalled product is relevant to his action, because he refers to the recalled pet food in his discovery requests. *See* December 24 Letter ¶¶ 4-6. Contrary to those references, however, Plaintiff affirmatively alleged in his most recent complaint that the pet food that is the basis for his claims was not part of Menu Foods' recall. *See* Amended Complaint ¶ 21.[3] The recalled pet food, which is the only pet food to which the retention plan applies, was manufactured between November 2006 and March 2007. The pet food that is the subject of Plaintiff Earl's lawsuit, however, was produced in April 2006 and September 2006, a full seven months and two months, respectively, before the recall-related product. Furthermore, Plaintiff alleges that the pet food that he purchased was contaminated by acetaminophen and cyanuric acid. Those allegations are unrelated to the reasons for the recall. Under no circumstances should Menu Foods be required to preserve product that is irrelevant to this case, especially given the associated undue expense and health and safety risks.

[3] There is presently no viable complaint in this action. Menu Foods is therefore relying upon the allegations in the last complaint Plaintiff filed — the Amended Complaint filed on October 16, 2007.

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V. THE COURT SHOULD GRANT THIS MOTION EVEN IF THE PRODUCT AT ISSUE WERE RELEVANT TO THIS ACTION

A. The Order Would Prevent Menu Foods from Incurring Undue Burden and Expense.

Issuing a protective order that limits the amount of recalled product Menu Foods must retain would prevent Menu Foods from incurring the burden and expense of having to store the product at issue in this motion.

Setting aside the cans of product manufactured the same day as the product Plaintiff claims he purchased, which cans Menu Foods is obviously retaining, Menu Foods currently is storing three categories of recall-related product at a significant expense and which pose health risks: (1) organized recalled pet food contained in cans, bags or pouches that are in cases and stored on full or partial pallets in Menu Foods' warehouses, and which has been inventoried ("Organized Recalled Product"); (2) unprocessed, perishable wheat gluten stored in 55-pound bags or in 900-kilogram totes, which has been inventoried ("Raw Wheat Gluten"); and (3) product (including recalled pet food, pet food not subject to the recall and non-pet food products) that was returned to Menu Foods by retail customers in a haphazard manner, in containers of varying types (such as trash cans, cardboard boxes and drums), and consisting of broken or punctured cans, bags and pouches of pet food, which has not been inventoried due to the significant costs that would be incurred ("Unorganized Inventory").

Specifically, Menu Foods has approximately 2.12 million cases of Organized Recalled Product, approximately 647,917 cases of Unorganized Inventory, and over 98,000 pounds of Raw Wheat Gluten. *See* Tab 3, Menu Foods Decl. ¶ 4. The cost to Menu Foods of storing all of those products is over $1.032 million per year. *Id.* By adopting the sampling and retrieval plan proposed by Menu Foods' expert, which is described further below, the Court can satisfy Plaintiff's testing needs — if the Court later determines that Plaintiff is entitled to test the product, which Menu Foods disputes — while relieving Menu Foods of this undue burden and expense. For this reason alone, this Court should enter an order identical to the MDL Order.

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B. The Order Would Eliminate Health Concerns as Identified by the FDA.

The requested protective order, if granted, would also eliminate the health concerns associated with storing large amounts of open, perishable product. There are potential issues of infestation and contamination associated with the continued storage of product that Menu Foods must guard against or eliminate by fumigating and vigilantly checking warehouses full of idle product. *See* Tab 3, Menu Foods Decl. ¶ 5.

Indeed, as part of the FDA's active investigation relating to the MDL Defendants' recalled products, the FDA specifically informed two other MDL Defendants, ChemNutra Inc. ("ChemNutra") and Del Monte Foods Company ("Del Monte"), by letter and electronic mail, respectively, that ChemNutra should not continue to store all 900,000 pounds of Raw Wheat Gluten in its possession, and that Del Monte should not continue to store its 51,000 pounds of Raw Wheat Gluten and pet food. *See* Tab 3, ChemNutra Decl., Ex. B. (letter from David Elder, U.S. Food and Drug Administration, to ChemNutra, dated June 29, 2007) ("FDA ChemNutra Letter"), at 1; Tab 3, Del Monte Decl., Ex. 2 (email from Megan Lauff, U.S. Food and Drug Administration, to Del Monte, dated November 13, 2007) ("FDA Del Monte Email"). Although recognizing that ChemNutra and Del Monte have properly handled the Raw Wheat Gluten, the FDA believes the destruction of the current quantities of Raw Wheat Gluten and pet food will significantly reduce the potential risk to the public health and the possibility of the wheat gluten entering the marketplace. *See* FDA ChemNutra Letter; FDA Del Monte Email. Notably, the FDA told ChemNutra to "consider the option of retaining a representative sample" of Raw Wheat Gluten and urged it to "seek whatever relief is appropriate from the Court." FDA ChemNutra Letter, at 2.

The same health risks identified by the FDA with respect to ChemNutra and Del Monte apply to the approximately 98,000 pounds of Raw Wheat Gluten and other product Menu Foods is storing. Tab 3, Menu Foods Decl. ¶ 4. By adopting the sampling and retrieval plan proposed by Menu Foods' expert, which is described further below, the Court will properly balance any of Plaintiff's future testing needs, which Menu Foods maintains do not involve this product, with the FDA's findings. Menu Foods is capable of storing a representative sample of the Raw Wheat Gluten (but not all of it) and recalled product to reduce the risks addressed by the FDA. *See, e.g.*, Tab 3, Menu Foods Decl. ¶ 11. Thus, the requested protective order should be granted.

C. Menu Foods' Expert Has Identified a Sampling and Retrieval Plan Sufficient for Plaintiff's Evidentiary Needs, the MDL Plaintiffs' Expert Approved Such Plan, and the MDL Court Adopted Such Plan.

Menu Foods has good cause for the requested Order because, even if the Court determines that the recall-related product Menu Foods currently is storing is relevant to this action, Menu Foods' expert has devised a sampling and general retrieval plan that demonstrates that the expenses and safety concerns discussed above are unnecessary, and the MDL Plaintiffs' expert generally approves of that plan. By contrast, Plaintiff Earl has not retained an expert to review or assess the sampling and retrieval plan identified by Menu Foods' expert. Rather, Plaintiff — who is not a statistician — has simply rejected the plan based upon his own views. Plaintiff has not, and cannot, set forth a sufficient reason why Dr. McCabe's plan should not be implemented.

Menu Foods' expert, Dr. George P. McCabe, Professor of Statistics and Associate Dean for Academic Affairs, College of Science, at Purdue University,[4] has conducted an analysis as to the quantity of Organized Recalled Product and Raw Wheat Gluten that the MDL Defendants should retain. He also has created a retrieval plan identifying the method of collecting samples for those categories of product to ensure that a statistically representative sample is obtained that will satisfy the research and testing needs of the MDL Plaintiffs and other interested parties, such as plaintiffs in other state actions (and, if this Court so determines, the Plaintiff in this action), including a determination of the presence and range of toxin, if any,

[4] Dr. McCabe's declaration ("McCabe Decl.") and curriculum vitae are attached as Exhibit 10 to the Memorandum in Support of the MDL Motion. *See* Tab 3, McCabe Decl.

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contained in the product. Dr. McCabe concludes that the MDL Defendants need to retain only 500 units of the Organized Recalled Product for any given date of manufacture for each MDL Defendant's recipes (a "SKU date") and all units of Organized Recalled Product for which less than 500 units exist. He further concludes that MDL Defendants need to retain 500 samples per batch of Raw Wheat Gluten for each batch and all Raw Wheat Gluten from a particular batch for which less than 500 samples exist. *See* Tab 3, McCabe Decl. ¶ 11; Tab 3, McCabe Depo., at 11, 14.[5] Finally, Dr. McCabe has concluded that the Unorganized Inventory is unnecessary to his sampling and general retrieval plan. The MDL Plaintiffs' expert, Dr. Nicholas P. Jewell,[6] has reviewed Dr. McCabe's sampling and general retrieval plan, and Dr. Jewell agrees that the logic is sound. The MDL court approved the sampling and general retrieval plan in the MDL Order.

The sampling and general retrieval plan is consistent with The Reference Manual on Scientific Evidence, which expressly approves of analytical testing on sampled units to measure the larger population, as long as the sampling is not biased. *See* Fed. Judicial Center, Reference Manual on Scientific Evidence 98-102 (2d ed. 2000). Dr. McCabe's sampling and retrieval plan for the MDL Defendants, including Menu Foods, will result in random, unbiased samples of the Organized Product and Raw Wheat Gluten. Such samples will produce results that are statistically significant at the 95% confidence level. Tab 3, McCabe Decl. ¶ 11. At this confidence level, there is a 95% chance the sampling plan will yield accurate results — that is, the level of contamination in the random sample (if any) will represent the total amount of contamination in the entire population of the recalled pet food and Raw Wheat Gluten. *See* Fed. Judicial Center, Reference Manual on Scientific Evidence 123-25 (2d ed. 2000). Courts use results based on the testing of representative samples, even in criminal cases that "warrant[]

[5] Relevant portions of the November 30, 2007 Deposition of Dr. George P. McCabe ("McCabe Depo.") are attached as Exhibit 11 to the Memorandum in Support of the MDL Motion.

[6] Dr. Jewell is a Professor of Biostatistics and Statistics at the University of California at Berkeley.

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special concern." *E.g., United States v. Shonubi*, 895 F. Supp. 460, 465, 518, 519-521, 524 (E.D.N.Y. 1995) (Weinstein, J.) (for sentencing purposes, relying on statistical data from representative samples, in part, in finding that defendant "smuggled between 1,000 and 3,000 grams on his eight trips").[7]

Again, Plaintiff has not retained an expert to review Dr. McCabe's sampling and retrieval plan; rather Plaintiff simply rejected the plan based on his own views. As did the MDL Court, this Court should approve the sampling plan and Menu Foods' retention of only that amount of Organized Recalled Product and Raw Wheat Gluten necessary to execute the sampling plan.

D. Unorganized Inventory is Not Necessary to This Case or the Sampling Plan.

Menu Foods also moves this Court to issue an Order permitting the disposal of all of the Unorganized Inventory, as did the MDL Court. As mentioned above, retention of the Unorganized Inventory is not necessary to Dr. McCabe's sampling and retrieval plan. Inventorying the Unorganized Inventory, which is the only way in which it could even be *potentially* useful, would cost Menu Foods over $3.8 million.

As mentioned above, the "Unorganized Inventory" is product and material that was returned to Menu Foods in an unorganized, haphazard manner and was not well packaged in most instances. Tab 3, Menu Foods Decl. ¶ 9. This Unorganized Inventory consists of various items, including product not subject to the recall, non-pet food items, trash and even competitors' products. *See id.* Some of the Unorganized Inventory is damaged and is leaking, creating a risk of infestation and creating health and safety risks to the public. While Menu Foods has attempted to store and maintain the Unorganized Inventory safely, often fumigating and repackaging it, that effort is an enormous economic burden. *See id.* ¶ 10.

[7] *Accord NutraSweet Co. v. X-L Eng'g Co.*, 227 F.3d 776, 782, 787, 792 (7th Cir. 2000) (affirming District Court's conclusion that defendant was liable to NutraSweet for polluting NutraSweet's property where NutraSweet's expert tested soil samples to measure amount of contamination).

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The Unorganized Inventory is completely unnecessary for the adjudication of Plaintiff's lawsuit. Plaintiff has informed Menu Foods that he has multiple unopened cans of the pet food that is the subject of this action bearing the same date and time stamps as the pet food that he alleges he fed to his cat. *See* Letter from Donald R. Earl to Charles A. Willmes and Stellman Keehnel, dated October 16, 2007 (attached to this Motion at Tab 5) ("I have enough unopened cans of food left where I should be able to make one of each time and date stamped lot number available . . . ."). Thus, Plaintiff already has the evidence relevant to his claims against Menu Foods in his possession. In addition, the sampling and general retrieval plan authorized by the MDL Court will have no effect on any retained, inventoried samples of the pet food relevant to Plaintiff's claims that Menu Foods may possess. Menu Foods has confirmed that it possesses cans of the products that are the subject of Plaintiff's lawsuit from the same production day as the product that Plaintiff claims to have purchased and fed to his cat. Thus, sufficient product relevant to Plaintiff's claims exists to satisfy the parties' discovery needs in this case.

Moreover, the incredible burden and expense that would be required to inventory and preserve the Unorganized Inventory substantially outweighs any conceivable discovery benefit that it could provide. Since the product is mostly uninventoried and unorganized, it simply cannot be sampled by SKU date without unreasonable time and expense and is of no importance to Dr. McCabe's sampling and retrieval plan. Tab 3, McCabe Decl. ¶¶ 4-5, 11; Tab 3, McCabe Depo., at 15-17. For Menu Foods to sort and organize the roughly 647,000 cases of Unorganized Inventory to determine whether the Unorganized Inventory contains product for any of the SKU dates for which it has no product within its Organized Product — or which possibly could relate to Plaintiff's claims — would take 23 employees approximately 16 months at a cost of over $3.8 million. Tab 3, Menu Foods Decl. ¶¶ 4, 10. Moreover, even if the Unorganized Inventory were inventoried, there is no guarantee that product would be identified within the Unorganized Inventory for SKU dates on which Menu Foods does not possess product within the Organized Recalled Product or for the dates which Plaintiff may

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argue are relevant to his case. Thus, there is no guarantee of finding product that was manufactured on the dates that Plaintiff claims the pet food at issue in this action was manufactured.

Nor is such an effort remotely necessary, given the dispositive fact that *both* Plaintiff and Menu Foods are retaining cans from the same production date of the product that Plaintiff contends he fed his cat.

Thus, such a commitment of labor and resources is unnecessary because Plaintiff claims to have unopened cans of the pet food that he allegedly fed his cat, the pet food at issue in this case is not recalled pet food and therefore is not part of the Organized Recalled Product, and any remote chance that the Unorganized Inventory could have product potentially relevant to this case is far outweighed by the expense of inventorying such material and continuing to store it. *See Gillett*, 132 Wn. App. at 826 (holding that court must balance utility of discovery against "burdens and risks" that it would cause and "limit the frequency or extent of use of the discovery methods to prevent undue burdens"). Moreover, even if the pet food at issue in this action were recalled pet food, such a commitment of labor and resources would be unnecessary because of the sampling and retrieval plan set forth by Dr. McCabe and approved by the MDL Plaintiffs' expert, Dr. Jewell. As a result, the Unorganized Inventory is of no use. Accordingly, Menu Foods requests the Court to allow it to dispose of the Unorganized Inventory, as the MDL Court has already ordered.

VI. PRINCIPLES OF COMITY DICTATE THAT THIS COURT SHOULD DEFER TO THE FEDERAL MDL COURT'S ORDER

This Court should defer to the MDL Order, which was issued in a related litigation. State courts give comity to decisions by federal courts. *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 195-96, 165 P.3d 4 (2007) (considering argument related to bankruptcy court order that was not raised in intermediate appellate court because it "implicates comity and proper respect for the federal courts"); *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W. 2d 423, 426 (Tex. Ct.

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App. 1993) (reversing trial court and concluding that state court "must give due deference and respect to" protective order issued by federal court); *Wolgin v. State Mutual Investors*, 265 Pa. Super. 525, 530-31, 402 A.2d 669, 672, 674 (Pa. Super. Ct. 1979) (upholding dismissal of state complaint where two similar actions were pending in Ohio federal court; explaining that involvement by state court would "severely interfere with an ongoing Federal Court action" and that "principles of 'comity' should be invoked"); *State of Illinois v. Bainter*, 126 Ill. 2d 292, 297, 305, 533 N.E. 2d 1066, 1067, 1071 (Ill. 1989) (affirming trial court's refusal to interfere with federal decision; trial court ruled that it would be "inappropriate for this court not to extend comity to the Federal court order"). Deference to federal orders helps "to maintain harmony" between the courts. *Wolgin*, 402 A.2d at 673 (applying *In re: Estate of Girard*, 423 Pa. 297, 224 A.2d 761 (Pa. 1966), where Pennsylvania Supreme Court refused to consider an appeal until federal appellate court addressed District Court's interpretation of a Pennsylvania statute).

Thus, this Court should defer to the MDL Court's decision and enter an identical order in this action so that Menu Foods can be relieved of the unnecessary burden and expense of storing product that is irrelevant to this action. Any other result could render the well-reasoned and supported MDL Order meaningless, despite the fact that it covers over 100 cases and was designed to protect plaintiffs' evidentiary needs while alleviating Menu Foods', and the other MDL Defendants', significant burden associated with continuing to store all of the product.

VII. PLAINTIFF SHOULD PAY MENU FOODS' ATTORNEYS' FEES AND EXPENSES INCURRED IN BRINGING THIS MOTION

Civil Rule 26(c) expressly provides that the fee and expense provisions of Civil Rule 37(a)(4) apply to a motion for a protective order. *See* CR 26(c) ("The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion."). Under Rule 37(a)(4), if the motion is granted, the Court must, after giving the opposing party an opportunity to be heard, order the opposing party to pay the moving party's expenses, including

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its attorneys' fees, "unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." CR 37(a)(4); *see Eugster v. City of Spokane*, 121 Wn. App. 799, 814-15, 91 P.3d 117 (2004) (approving fee award where discovery requests were not substantially justified). A position is "substantially justified" only if it is "justified to a degree that would satisfy a reasonable person," *i.e.*, it has a "reasonable basis in both law and fact." *See Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) (internal quotations omitted).

Plaintiff's refusal to consent to Menu Foods' sampling and retrieval plan is not substantially justified. As explained above, the sampling and retrieval plan does not affect this case because the pet food on which Plaintiff's claims are based was produced months before the recall period, and therefore is not part of the recalled pet food. Further, Plaintiff has affirmatively represented that he has cans of unopened food with the same date and time stamps as the product he allegedly fed his cat. Moreover, even if Menu Foods' retention of recalled pet food were somehow relevant to this case, the sampling and retrieval plan designed by Dr. McCabe and approved by the MDL Court is structured to ensure that Menu Foods retains a representative sample of the recalled products sufficient to satisfy any discovery needs. And the Unorganized Inventory is completely unnecessary for discovery in this case and for the sampling and general retrieval plan. Plaintiff has not retained an expert to review or assess Dr. McCabe's sampling and retrieval plan, and Plaintiff's rejection of that plan and refusal to agree to entry of the requested order is therefore not substantially justified.

Because Plaintiff cannot establish a reasonable basis for his failure to consent to the sampling and retrieval plan, the Court should order Plaintiff to pay the expenses and attorneys' fees that Menu Foods incurred in bringing this Motion. Menu Foods will submit proof offers following entry of an order indicating that Plaintiff shall bear Menu Foods' fees connected with this motion.

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VIII. CONCLUSION

Although the pet food at issue in this action is not recalled pet food, out of an abundance of caution Menu Foods has not disposed of any product as permitted in the MDL Order so as not to violate any potential evidence preservation obligations in this action. As such, Menu Foods continues to incur the significant expenses associated with the continued storage of all the Organized Recalled Product, Raw Wheat Gluten and Unorganized Inventory, and the associated health risks also continue to exist.

Although Menu Foods is under no obligation to retain the product at issue in this motion for use in this action because Plaintiff admits that the pet food at issue in this lawsuit is not recalled pet food, Menu Foods nonetheless took the precautionary measure of providing Plaintiff in this action with a copy of MDL Motion and supporting papers and the MDL Order, and requesting that Plaintiff agree not to oppose Menu Foods' request that this Court enter an order identical or substantially similar to the MDL Order. Plaintiff in this action declined Menu Foods' request. Menu Foods therefore had no choice but to file this motion and seek relief from this Court.

For the reasons described above and in the accompanying papers filed with this Motion, Menu Foods respectfully requests that this Court enter an Order identical to the MDL Order by entering the proposed order attached hereto at Tab 1. Menu Foods further requests that the Court award Menu Foods its attorneys' fees incurred in bringing this Motion, which Plaintiff had no substantial justification under the circumstances to oppose.

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Respectfully submitted this 25th day of January, 2008.

DLA PIPER US LLP

Stellman Keehnel, WSBA No. 9309
Bradley T. Meissner, WSBA No. 39592
Attorneys for Defendant
Menu Foods Income Fund

DECLARATION OF SERVICE

I, Bradley T. Meissner, certify that on the 25th day of January, 2008, I am causing to be served a copy of the following documents on *pro se* Plaintiff and counsel of record at the addresses listed below:

1. Defendant Menu Foods Income Fund's Motion To Limit The Retention Of Organized Recalled Product, Raw Wheat Gluten And Unorganized Inventory with attached proposed form of order;

2. Defendant Menu Foods Income Fund's Certificate Of Compliance With Civil Rule 26(i);

3. Statement of Unpublished Authorities; and

4. This Declaration of Service.

Donald R. Earl 3090 Discovery Road Port Townsend, WA 98368 **(pro se)**	☒ Via Hand Delivery ☐ Via U.S. Mail ☐ Via Facsimile ☐ Via E-mail
Charles A. Willmes Merrick, Hofstedt & Lindsey, P.S. 3101 Western Avenue, Suite 200 Seattle, WA 98121	☒ Via Hand Delivery ☐ Via U.S. Mail ☐ Via Facsimile ☐ Via E-mail

Executed this 25th day of January, 2008, at Seattle, Washington.

Bradley T. Meissner

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